Supreme Court, U.S.
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88-41
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, DR. GEORGE AYERS, DR. WILLIAM SUTTON, DR. BERLEAN BURRIS, BEATRICE GILMORE AND SANDRA WEBB-BOOKER,

Petitioners,

v.

ROBIN AKINS, ALBERTA BELL, ESTELLE BRADLEY, TANYA DAVIS, CAROLYN GRANT, NAOMI HAYS, TONI SADLER, MARGARET SAYERS, RHONDA SINGLETON AND BETTY WHITE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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July 7, 1988

QUESTIONS PRESENTED

I. IS THE DECISION OF THE APPELLATE COURT THAT THE NOTICE OF APPEAL IS "MARGINALLY ADEQUATE" IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *TORRES* V. *OAKLAND SCAVENGER COMPANY,* U.S. , 56 U.S.L.W. 4740 (June 24, 1988) AND WITH FEDERAL RULE OF APPELLATE PROCEDURE 3(c)?

II. DOES THE SUMMARY REINSTATEMENT ON APPEAL OF A PENDENT CAUSE OF ACTION VIOLATE THE PRINCIPALS ESTABLISHED BY THIS COURT IN *MINE WORKERS* V. *GIBBS,* 383 U.S. 715 (1966), AND UNFAIRLY JEOPARDIZE THE DEFENSE OF QUALIFIED GOOD FAITH IMMUNITY?

LIST OF ALL PARTIES

Petitioners

1. Board Of Governors Of State Colleges And Universities (Of Illinois).
2. Dr. George Ayers
3. Dr. William Sutton
4. Dr. Berlean Burris
5. Beatrice Gilmore
6. Sandra Webb-Booker

Respondents

7. Robin Akins
8. Alberta Bell
9. Estella Bradley
10. Tanya Davis
11. Carolyn Grant
12. Naomi Hays
13. Toni Sadler
14. Margaret Sayers
15. Rhonda Singleton
16. Betty White

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No.

IN THE

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OCTOBER TERM, 1988

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, DR. GEORGE AYERS, DR. WILLIAM SUTTON, DR. BERLEAN BURRIS, BEATRICE GILMORE AND SANDRA WEBB-BOOKER,

Petitioners,

v.

ROBIN AKINS, ALBERTA BELL, ESTELLE BRADLEY, TANYA DAVIS, CAROLYN GRANT, NAOMI HAYS, TONI SADLER, MARGARET SAYERS, RHONDA SINGLETON AND BETTY WHITE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 4, 1988.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, reported as *Akins* v. *Board of Governors of State Colleges and Universities,*

840 F.2d 1371 (7th Cir. 1988), appears in the Appendix hereto along with the separate judgment of that court. The opinions of the district court for the Northern District of Illinois, Eastern Division and the Recommendation of the U.S. Magistrate are not reported but are also included in the Appendix.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Seventh Circuit were entered March 4, 1988. A timely petition for rehearing was denied April 11, 1988, and a copy of such order is also included in the Appendix. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 3(c) provides:

Rule 3. Appeal as of Right—How Taken

* * *

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Petitioners are the statutorily created governing board for five universities in the State of Illinois, Dr. George Ayers the President of one of those universities (i.e. Chicago State University, hereinafter "CSU"), Dr. William Sutton former Provost and Vice President of Academic Affairs of CSU, Dr. Berlean Burris the Dean of CSU's College of Nursing, Beatrice Gilmore a former Nursing Department Chairperson, and Sandra Webb-Booker a Coordinator for a nursing course entitled "Advanced Medical Surgical Nursing" taught at CSU. Petitioners were sued by nine former CSU nursing students under 42 U.S.C. § 1983 for alleged deprivation of those students' rights to substantive due process in connection with the administration of an examination for the Advanced Medical Surgical Nursing course. The nursing students sought temporary and permanent injunctive relief and compensatory and punitive damages. In a pendent claim they asserted that Petitioners were guilty of wilful and wanton tortious conduct in violation of state common law.

Petitioners here all moved to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. United States Magistrate Elaine E. Bucklo was referred the Petitioners' motion and on December 2, 1986 she issued her Report and Recommendation. The United States District Court accepted and adopted with qualifications the Magistrate's Report and Recommendation and Respondent Robin Akins filed a notice of appeal on June 12, 1987. The Seventh Circuit affirmed in part and reversed in part holding that: (a) the notice of appeal was "marginally adequate" to confer jurisdiction over eight of the nine respondents not named in the notice, (b) the federal claim must be reinstated for possible prospective injunctive relief against the individual defendants in the

official capacities and, therefore (c) the pendent state common law tort count "must" be reinstated against the individual defendants *qua* individuals.

II. STATEMENT OF RELEVANT FACTS

Robin Akins and eight others were senior nursing students at CSU. According to their complaint, they were enrolled in course No. 332, "Nursing VII, Advanced Medical Surgical Nursing", during the fall semester of the 1984-85 academic year. These students claim that they were deprived of substantive due process because Petitioners administered a final examination on December 17, 1984 which was invalid in that it did not fairly evaluate students, and that Petitioners also manipulated final examination questions, manipulated quiz and examination grades and manipulated the clinical evaluations of the students.

III. PROCEEDINGS BELOW

Petitioners moved to dismiss the complaint on the grounds that its federal claim against the Board of Governors of State Colleges and Universities and against the individual defendants in their official capacities was barred by the eleventh amendment. The individual petitioners further argued that an action against the individual defendants *qua* individuals could not be maintained because they were protected by qualified immunity from suit. Magistrate Bucklo would have permitted Count I to stand only to the extent that it requested prospective injunctive relief against the individual defendants in their official capacities. The district court accepted and adopted the Magistrate's recommendation with the clarification that Count I should be dismissed in its entirety because the students, in a memorandum filed after the Magistrate's recommendation, claimed that they were not suing the individual petitioners in

their official capacities. Consequently, the pendent Count II was also dismissed.

A notice of appeal was filed on June 12, 1987. The caption refers to "ROBIN AKINS, et. al., Plaintiffs". The text states: "NOTICE is hereby given that ROBIN AKINS, plaintiff named above, hereby appeals . . . ." No other notice of appeal or motion was ever filed with respect to this the notice of appeal.

The United States Court of Appeals for the Seventh Circuit affirmed in part and reversed in part. Over Petitioners' objections, it found the notice of appeal "marginally adequate" to serve as a notice for all nine nursing students.

The court also affirmed the decision below except that it differed with the district court as to whether these students had abandoned their claim for prospective injunctive relief against the defendants in their official capacities. Count I was, therefore, reinstated by the appellate court and the court held that as a consequence the pendent state law count "must be reinstated".

Petitioners filed a petition for rehearing contending again that the notice of appeal did not comply with Federal Rule of Appellate Procedure 3(c) and that it was inappropriate to require the district court to reinstate the pendent count. That petition was denied without further comment.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S HOLDING THAT A NOTICE OF APPEAL CAPTIONED "ROBIN AKINS, ET AL.," BUT WHICH SPECIFICALLY NAMES ONLY ONE APPELLANT IN ITS TEXT IS "MARGINALLY ADEQUATE" IS IN DIRECT CONFLICT WITH FEDERAL RULE OF APPELLATE PROCEDURE 3(c) AND THIS COURT'S DECISION IN *TORRES* V. *OAKLAND SCAVENGER COMPANY,* U.S. , 56 U.S.L.W. 4740 (JUNE 24, 1988).

Petitioners believe that the decision of the United States Court of Appeals for the Seventh Circuit is in direct conflict with this Court's decision in *Torres* v. *Oakland Scavenger Company,* U.S. , 56 U.S.L.W. 4740 (June 24, 1988). The appellate court relied on "liberal construction" in stating:

> While we think the question is a close one and the practice followed here is not to be repeated, we believe this notice was marginally adequate. Throughout the litigation in the district court, the plaintiffs had been represented by the same attorney and had presented precisely the same contentions. The facts and law applying to each were the same. Moreover, the defendants make no representation of surprise or prejudice. *See Ayres* v. *Sears, Roebuck & Co.,* 789 F.2d 1173, 1177 (5th Cir. 1986); *see also Brubaker* v. *Board of Educ.,* 502 F.2d 973, 983 n. 4 (7th Cir. 1974), *cert. denied,* 421 U.S. 965, 95 S.Ct. 1953, 44 L. Ed. 2d 451 (1975).

Akins v. *Board of Governors of States Colleges and Universities,* 840 F.2d 1371, 1371-72 n. 1 (7th Cir. 1988).

The appellate court's decision is tied inextricably to the conclusion that by adding "et al." to the caption Respon-

dents satisfied the requirements of Federal Rule of Appellate procedure 3(c). This conclusion is in direct conflict with this court's decision in *Torres:*

> Petitioner urges that the use of "et al." in the notice of appeal was sufficient to indicate his intention to appeal. We cannot agree. The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants. The use of the phrase "et al.," which literally means "and others," utterly fails to provide such notice to either intended recipient. Permitting such vague designation would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions. The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal.

Torres v. *Oakland Scavenger Company,* U.S. , 56 U.S.L.W. 4740, 4742 (June 24, 1988).

On appeal, and in their petition for rehearing, Petitioners relied on cases including *Farley Transportation Co.* v. *Santa Fe Trail Transportation Co.,* 778 F.2d 1365, 1368-1370 (9th Cir. 1985) and *Covington* v. *Allsbrook,* 636 F.2d 63, 64 (4th Cir. 1980). This line of cases is expressly followed by *Torres.* The Respondent and the appellate court relied on cases like *Ayres* v. *Sears, Roebuck & Co.,* 789 F.2d 1173, 1977 (5th Cir. 1986); *Harrison* v. *United States,* 715 F.2d 1311, 1312-1313 (8th Cir. 1983); and *Williams* v. *Frey,* 551 F.2d 932, 934 n. 1 (3rd Cir. 1977). These cases are expressly rejected by the opinion in *Torres.*

The appellate court's decision and order is therefore in direct conflict with this Court's interpretation of Federal Rule of Appellate Procedure 3(c). If allowed to stand its

holding will unfairly prejudice these Petitioners and confuse the status of the applicable law for all interested federal practioners. At a minimum, the case must be remanded for reconsideration in view of this Court's decision in *Torres.*

II. THE SEVENTH CIRCUIT'S HOLDING THAT A PENDENT CAUSE OF ACTION AGAINST SOME INDIVIDUAL DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES "MUST" BE REINSTATED AND HEARD WITH FEDERAL CLAIMS FOR PROSPECTIVE INJUNCTIVE RELIEF AGAINST SOME INDIVIDUAL'S IN THEIR OFFICIAL CAPACITIES CONFLICTS WITH THIS COURT'S DECISION IN *MINE WORKERS* V. *GIBBS*, 383 U.S. 715 (1966), AND UNFAIRLY JEOPARDIZES THE DEFENSE OF QUALIFIED GOOD FAITH IMMUNITY

In *Mine Workers* v. *Gibbs,* 383 U.S. 715, 735 86 S.Ct. 1130, 1138 (1966) this Court found that a federal court has jurisdiction over an entire action including pendent state claims if the federal and state claims derive from a common nucleus of operative fact and are such that a person would ordinarily be expected to try them in one judicial proceeding. This Court also stressed that pendent jurisdiction is a doctrine of discretion and not of right. That discretion is reposed in the first instance in the district courts of the United States. *See Carnegie-Mellon University* v. *Cohill,* U.S. , 108 S.Ct. 614, 619 (1988).

Some of the concerns and values which should determine whether the exercise of pendent jurisdiction is appropriate are tied in this cause to the doctrine of good faith immunity. The individual defendants are now parties to Count I only in their official capacities and are not the real parties in interest. As the appellate court itself said in

quoting *Scott* v. *Lacy,* 811 F.2d 1153, 1153-1154 (7th Cir. 1987):

> As a practical matter, a public official who is a defendant in a suit seeking an injunction is not "on trial" at all. The suit seeks relief against him in his official capacity; he need not attend the trial, which will be conducted by attorneys representing the governmental body. If he leaves office during the interim, he leaves the case behind and his successor becomes the party.

Akins v. *Board of Governors of State Colleges and Universities,* 840 F.2d 1317, 1377 (7th Cir. 1988). By holding, as the appellate court did, that the individual Petitioners, *qua* individuals, are entitled to good faith immunity and are not properly before the district court under Count I but, nevertheless, holding that Count II "must" be reinstated, the appellate court has not only deprived the district court of its discretion but also effectively undercut the good faith immunity defense and exposed the individual Petitioners to liability in a federal court where they do not belong as individuals.

In *Harlow* v. *Fitzgerald,* 457 U.S. 800, 806, 102 S.Ct. 2727, 2732 (1982) this Court stressed the need for good faith immunity to shield public officials from undue interference with their duties. It is not desirable to force public officials to carry out their burdens with the fear of being sued for doing their duty. *See Mitchell* v. *Forsyth,* 472 U.S. 511, 105 S.Ct. 2806 (1985). But the appellate court has lifted the shield, circumvented the good faith immunity defense and denied the district court the discretion afforded by *Mine Workers* v. *Gibbs,* 383 U.S. 715, 86 S.Ct. 1130 (1966).

The required judicial deference to academic decisions and the required deference to the district court have been jeopardized here and this situation should not be tolerated. Boundaries carefully drawn must not be casually obscured.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit and, at a minimum, this case should be returned to the United States Court of Appeals for the Seventh Circuit for reconsideration in light of this Court's decision in *Torres* v. *Oakland Scavenger Company,* U.S. , 56 U.S.L.W. 4740 (June 24, 1988).

Respectfully submitted,

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July 7, 1988

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, DR. GEORGE AYERS, DR. WILLIAM SUTTON, DR. BERLEAN BURRIS, BEATRICE GILMORE AND SANDRA WEBB-BOOKER,
Petitioners,

v.

ROBIN AKINS, ALBERTA BELL, ESTELLE BRADLEY, TANYA DAVIS, CAROLYN GRANT, NAOMI HAYS, TONI SADLER, MARGARET SAYERS, RHONDA SINGLETON AND BETTY WHITE,
Respondents.

CERTIFICATE OF SERVICE

Mark T. Dunn, counsel of record, hereby certifies, pursuant to Supreme Court Rule 28.3 and 28.5(c), that three copies of the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit were served by first class mail, postage prepaid, by mailing on July 7, 1988, upon all parties required to be served. A list of the names and addresses of those parties is:

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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, DR. GEORGE AYERS, DR. WILLIAM SUTTON, DR. BERLEAN BURRIS, BEATRICE GILMORE AND SANDRA WEBB-BOOKER,
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Respondents.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBIN AKINS, et al.,
Plaintiffs.

vs.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, et al.,
Defendants.

No. 85 C 5948

REPORT AND RECOMMENDATION
of Magistrate Elaine E. Bucklo

According to their complaint, the plaintiffs, senior nursing students at the College of Nursing at Chicago State University, were enrolled in the clinical nursing practice course number 332, "Nursing VII, Advanced Medical Surgical Nursing", during the fall semester of 1984-85. Because the college was having difficulties with the Illinois Department of Registration and Education over the poor performance of its graduates on the Illinois state nursing license examinations, the defendants decided to reduce the number of students in the Nursing VII course. They did this by:

> a) administering the final examination on December 17, 1984, which Defendants knew to be invalid in that it did not fairly evaluate students with respect to the material actually presented in the course during the semester;
>
> b) manipulating final exam questions and scores after the aforementioned final examination had been administered to Plaintiffs and others;

> c) basing evaluations of Plaintiffs' academic performance on factors not reasonably considered to be academic criteria;
>
> d) intentionally and knowingly falsifying Plaintiffs' clinical evaluations; and
>
> e) manipulating and altering quiz and examination grades throughout the fall trimester.

Complaint, ¶ 9. These actions injured the plaintiffs in their professional reputation, hindered their ability to obtain employment, deprived them of their interest in continuing their professional education, and caused them humiliation, embarrassment, and mental anguish. *Id.* at ¶¶ 11-12. The plaintiffs, therefore, filed the present action, alleging a federal claim under 42 U.S.C. § 1983 for violation of their right to due process and also alleging a pendent state law tort claim. The defendants move to dismiss on grounds of Eleventh Amendment immunity, § 1983 good faith immunity, failure of plaintiffs to allege a deprivation of a property or liberty interest, and failure to allege a deprivation of such an interest without due process of law.

I. ELEVENTH AMENDMENT

The Eleventh Amendment provides that

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.

U.S. Const. Amend. XI. The provision forbids not only suits in federal court by citizens of one state against another state, but also forbids such suits by citizens against their own state. *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984). However, while suits directly against the state

or entities which are arms of the state are barred, *Alabama v. Pugh*, 438 U.S. 781, 781-2 (1978) (dismissing State of Alabama and Board of Corrections on Eleventh Amendment grounds from suit brought under § 1983 seeking injunctive relief for violation of prisoners' Eighth and Fourteenth Amendment rights), the bar does not extend to all suits against state officials or governmental entities within the state. *See Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n. 54 (1978). Moreover, the extent of the bar differs depending on whether the claim is based on state or federal law. *See Pennhurst, supra*, 465 U.S. at 106. In order to determine whether the present suit is barred by the Eleventh Amendment, it is necessary to examine the relationship of the defendants to the state and the federal or state law basis of the claims against them.

A. Board of Governors

The Eleventh Amendment bar extends to suits against state entities which are arms of the state, whether the claim is based on state or federal law, but not to suits against independent political subdivisions of the state. *See Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977). In determining whether an entity is an arm of the state,

> the critical inquiry is whether a judgment would be paid from public funds in the state treasury. Among the subsidiary factors to be considered are whether the state entity can sue and be sued, whether it performs an essential governmental function, and whether it enjoys a substantial degree of political independence from the state.

Ranyard v. Board of Regents, 708 F.2d 1235, 1238 (7th Cir. 1983).

In *Ranyard*, the Seventh Circuit, applying these factors, concluded that the Illinois Board of Regents was an

arm of the state for Eleventh Amendment purposes and thus immune from suit in federal court. *Id.* at 1239. The powers of the Board of Governors are similar to those of the Board of Regents. Both can sue and be sued, Ill. Rev. Stat. Ch. 144 ¶¶ 307 (Board of Regents), 1007 (Board of Governors), but both are appointed by the governor, ¶¶ 302, 1002, and the budgets of both must be submitted to the Board of Education, ¶ 188. Both are considered arms of the state for the purposes of the Illinois Court of Claims Act. *Ellis v. Board of Governors,* 102 Ill.2d 387, 393, 466 N.E.2d 202, 205-6 (1984) (Board of Governors); *McGuire v. Bd. of Regents of Northern Illinois University,* 71 Ill.App.3d 998, 1000-1, 390 N.E.2d 632, 634 (4th dist. 1979) (Board of Regents). The Board of Governors, like the Board of Regents, is not an independent political subdivision but an arm of the state, and accordingly the Board of Governors must be dismissed from this action.[1] *See Pugh, supra,* 438 U.S. at 781-2 (1978).

B. Individual Defendants

Defendants in a § 1983 action may be sued in their individual capacities, their official capacities, or both. *See*

---

[1] A state's immunity under the Eleventh Amendment may be waived by state or federal law. *See Kentucky v. Graham,* ___ U.S. ___, 105 S.Ct. 3099, 3106 n. 14 (1985). § 1983, however, does not operate to waive states' immunity, *Quern v. Jordan,* 440 U.S. 332, 341 (1979); *Edelman v. Jordan,* 415 U.S. 651, 676-7 (1974), and Illinois has not waived its Eleventh Amendment immunity. *Duckworth v. Franzen,* 780 F.2d 645, 649 (7th Cir. 1985), *cert. denied,* 107 S.Ct. 71 (1986).

The defendants also argue that the Board of Governors is not a "person" under § 1983 and hence not subject to liability. Since the Board must be dismissed on Eleventh Amendment grounds, the court need not reach this issue.

Kolar v. County of Sangamon, 756 F.2d 564, 568-9 (7th Cir. 1985); *Cornelius v. La Croix,* 631 F.Supp. 610, 624 (E.D. Wis. 1986). Where the plaintiff states in his complaint in which capacity the defendants are being sued, that statement controls. *See Kolar, supra,* 756 F.2d at 568-9; *Hossman v. Blunk,* 784 F.2d 793, 796 (7th Cir. 1986); *Rubacha by Rubacha v. Coler,* 607 F.Supp. 477, 480 (N.D. Ill. 1985).

In the present case, the complaint is not clear as to whether the individual defendants are sued in their official capacities, as individuals, or both. The complaint merely lists the positions held by each defendant at Chicago State University and that each acted under color of state law. Naming a defendant's position has been held to raise a presumption that he is sued in his official capacity. *Duckworth v. Franzen, supra,* 780 F.2d at 649. The presumption is not conclusive, however, since it is plaintiff's choice in which capacity he wishes to sue, and he may ordinarily amend his complaint to conform to evidence at trial (and before trial except where the amendment will prejudice a defendant). *Id.;* Rule 15, Fed.R.Civ.P. In this case, plaintiffs state in their memorandum in opposition to the motion to dismiss that they are proceeding against the defendants as individuals. Responsive Memorandum at 4, 5. Therefore, although plaintiffs should have heeded the Seventh Circuit's request to expressly state in their complaint in what capacity they are suing any defendant, the complaint should be construed, as they request, to allege liability against the defendants as individuals. *Duckworth v. Franzen, supra,* 780 F.2d at 650; *Kolar v. County of Sangamon, supra,* 756 F.2d at 569.

While plaintiffs do not in their memorandum explicitly affirm the presumption that defendants are sued in their official capacity, since neither party expressly addressed this

issue, I will assume that plaintiffs are also suing defendants in their official capacity. If this is not correct, plaintiffs should inform the court by letter within ten days of this decision.

1. Official Capacity

Assuming plaintiffs are suing defendants in their official capacity, the question is whether their claim must be dismissed under the Eleventh Amendment. An action against an officer in his official capacity is in effect an action against the entity of which he is an officer. *Graham, supra,* 105 S.Ct. at 3105; *Monell, supra,* 436 U.S. at 690 n. 55. A judgment entered against an officer in such an action imposes liability on the entity he represents, *Brandon v. Holt,* 469 U.S. 464, 471-2 (1985), and not on him. *See Graham, supra,* 105 S.Ct. at 3105. Even where the entity he represents is the state or an arm of the state, however, such suits are not barred by the Eleventh Amendment when the action is based on federal rights. *See Regents of University of Michigan v. Ewing,* U.S. , 106 S. Ct. 507, 511 n. 6 (1985). Only prospective injunctive relief, however, is available. *See Edelman v. Jordan,* 415 U.S. 651, 664 (1974); *Quern, supra,* 440 U.S. at 337; *Ex Parte Young,* 209 U.S. 123, 159-60 (1908). This result represents a balance between Eleventh Amendment principles of sovereign immunity and the need to vindicate federal rights. *Pennhurst, supra,* 465 U.S. at 104-5.

The federal government, however, has no interest in enforcing state law rights. *See id.* at 106. Accordingly, where a claim is based on state law rather than federal law, the Eleventh Amendment prohibits not only suits directly against the state, but also suits against state officials in their official capacity, even if the plaintiff seeks only prospective injuctive relief. *Id.*

In the present case, the individual defendants are officers of Chicago State University. Chicago State University is "operate[d], manage[d], control[led] and maintain[ed]" by the Board of Governors. Ill.Rev. Stat. Ch. 144, ¶ 1001. Since the Board of Governors is an arm of the state, *see supra,* the plaintiffs may not recover money damages from the defendants in their official capacities. However, in Count I, the plaintiffs also sought to permanently enjoin the defendants "from pursuing a course of arbitrary and capricious conduct in evaluating student academic performance. . . ." in violation of the plaintiffs' Fourteenth Amendment rights. Complaint, Count I, prayer for relief, ¶ A. Such prospective injunctive relief for violation of federal rights is not barred by the Eleventh Amendment. *See Edelman, supra,* 415 U.S. at 664. Count II seeks damages and injunctive relief against the defendants in their official capacities for violation of state law rights. Such relief is barred by the Eleventh Amendment. *Pennhurst, supra,* 465 U.S. at 106.

2. Individual Capacity

A judgment against an official in his individual capacity runs against him personally and not against the entity of which he is an official. *Graham, supra,* __ U.S. at __, 105 S.Ct. at 3105. The official, and not the state, is "the real, substantial party in interest." *Cf. Pennhurst State School & Hosp., supra,* 465 U.S. at 101 (quoting *Ford Motor Co.* v. *Dept. of Treasury of Indiana,* 323 U.S. 459, 464 (1945)). Accordingly, plaintiffs' action against the defendants in their individual capacities is not barred by the Eleventh Amendment. *See Duckworth, supra, 780 F.2d at 649; Walker* v. *Rowe,* 791 F.2d 507, 508 (7th Cir. 1986). This result is the same whether the action is based on state or federal rights; since the state is not a party, the Eleventh Amendment has no applicability.

II SUBSTANTIVE DUE PROCESS[2]

To survive a motion to dismiss, a §1983 complaint must allege a violation of some federal constitutional or statutory right of the plaintiff. In the present case, plaintiffs allege a violation of plaintiffs' substantive due process rights.

To allege a violation of procedural due process, a plaintiff must allege a deprivation of some liberty or property interest; such interests may be created by state law. *See*

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[2] The plaintiffs apparently do not claim that their procedural due process rights were violated. To state a substantive due process violation, the plaintiff must allege a violation of a substantive constitutional right; the state's action is unconstitutional regardless of the fairness of the procedures used to implement it. In contrast, to state a procedural due process claim, the plaintiff must allege not only a deprivation of some property of liberty interest, but also that the procedures surrounding the deprivation were inadequate. *Daniels v. Williams*, __ *U.S.* __, 106 S.Ct. 662, 677-8, 88 L.Ed. 2d 662, 673 (1986) (Stevens, J., concurring in the judgment). In academic dismissals, procedural due process does not require a formal hearing. *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 90-91 (1978). The College of Nursing Student Handbook does, however, set out procedures whereby students can challenge academic decisions they think are unfair. *Id.* at pp. 28-31. Although the plaintiffs need not exhaust these remedies to bring a §1983 action, *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496, 498 (1982), these remedies may provide the plaintiffs all the procedure they are due, particularly in light of the relatively low requirements for procedural due process in academic dismissal cases. *Cf. Lewis v. Hillsborough Transit Authority*, 726 F.2d 668, 669 (11th Cir. 1984) (on petition for rehearing en banc); *People of State of Illinois v. Bd. of Education*, 606 F. Supp. 385, 390 n. 5 (N.D. Ill. 1985). Since the plaintiffs do not argue the adequacy of these procedures, the court will consider only their substantive due process rights.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Substantive due process is somewhat different; it protects only rights created by the constitution. *Ewing*, *supra*, 106 S.Ct. at 515 (Powell, J., concurring). A state law property or liberty right may give rise to such a substantive due process right, but it need not. *See id.* at 512 (opinion of the court); *Toney-El v. Franzen*, 777 F.2d 1224, 1227 (7th Cir. 1985) (prisoner has a liberty interest in being released from prison before the end of his term for good behavior, but this interest creates no substantive due process rights).

Where, however, a person has a property right, substantive due process prohibits the state from depriving the person of that property interest for arbitrary or capricious reasons. *Regents of University of Michigan v. Ewing*, 742 F.2d 913, 915 (6th Cir. 1984), *rev'd. on other grounds*, __ U.S. __, 106 S.Ct. 507, 512, 515 (1985); *Stoller v. College of Medicine*, 562 F.Supp. 403, 412 (M.D. Pa. 1983), *aff'd. mem.*, 727 F.2d 1101 (3d Cir. 1984). Accordingly, some courts have expressly recognized a substantive due process right of college or university students in academic dismissal cases not to be dismissed arbitrarily for reasons unrelated to their academic performance, *see*, *Ewing*, *supra*, 742 F.2d at 915; *Stoller*, *supra*, 562 F.Supp. at 412, and others have assumed for the purposes of the decision, or stated in dicta, that such a right may exist. *Ewing*, *supra*, 106 S.Ct. at 512, 513; *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 91 (1978); *Ikpeazu v. University of Nebraska*, 775 F.2d 250, 253 (8th Cir. 1985); *Schuler v. University of Minnesota*, 788 F.2d 510, 515 (8th Cir. 1986); *Mauriello v. U. of Med. & Dentistry of N.J.*, 781 F.2d 46, 52 (3rd Cir.; *cert. denied*, 107 S.Ct. 80 (1986); *Hines v. Rinker*, 667 F.2d 699, 703 (8th Cir. 1981); *Greenhill v. Bailey*, 519 F.2d 5, 10 n. 12 (8th Cir. 1985); *Stevens v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981). Under these holdings, if the plaintiffs have a state law property interest in

their continued college education, plaintiffs' complaint, which alleges that defendants made a purportedly academic decision that in fact "is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment", *Ewing*, *supra*, 106 S.Ct. at 513, states a claim for violation of their substantive due process rights.

Under Illinois law, a college or university has a contractual relationship with its students, the terms of which are set out in the college's catalogues. *Wilson v. Illinois Benedictine College*, 112 Ill.App.3d 932, 937, 445 N.E.2d 901, 906 (2d Dist. 1983); *see Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 329-30, 371 N.E.2d 634, 639-40 (1977). Enrolled students thus have a property interest in their continued education. Moreover, although the College of Nursing Student Handbook does not expressly state that students will be graded and evaluated fairly, it does provide procedures by which students may appeal grades they think are unfair, *id.* at pp. 28-31, and such provisions constitute an implied promise that grading will not be arbitrary, which becomes part of the contract between students and the College of Nursing. *See Ikpeazu*, *supra*, 775 F.2d at 253.

Plaintiffs thus have a substantive due process right to continued education free from arbitrary grading decisions unrelated to their academic performance. Their allegations that the defendants altered their test scores and gave them tests unrelated to their course work in order to reduce the number of students in the Nursing VII course are sufficient to state a violation of this right; such actions by the defendants, if proven, would be "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Ewing*, *supra*, 106 S.Ct. at 513.

III. IMMUNITY

Defendants argue that even if they did violate plaintiffs' due process rights, they are entitled to a qualified good faith immunity.

Officials are entitled to immunity if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To be "clearly established," the law must be "such that a reasonable person would have known that her actions were unconstitutional. . . . [A] reasonable person is not expected to act as a legal scholar and predict the future direction of the law." *Kompare v. Stein*, 801 F.2d 883, 887 (7th Cir. 1986). There must be "case law which clearly and consistently recognized the constitutional right." *Lojuk v. Johnson*, 770 F.2d 619, 628 (7th Cir. 1985) *cert. denied*, 106 S.Ct. 822 (1986) (quoting *Coleman v. Frantz*, 754 F.2d 719, 730 n. 15 (7th Cir. 1985)). Moreover, the test is concerned only with federal rights: in determining whether an official is entitled to immunity, it is irrelevant that his conduct violates state laws or rights. *Davis v. Scherer*, 468 U.S. 183, 193-4 n. 12 (1984); *Kompare*, *supra*, 801 F.2d at 888 n. 6.

Applying these standards to the present case, it is apparent that decisions had not "clearly established" plaintiff's substantive due process right not to be subjected to academic decisions made on irrational or nonacademic grounds in the 1984-85 year, the time the conduct complained of occurred. One district court in Pennsylvania had held in 1983 that such a right existed, and its decision was affirmed without opinion by the Third Circuit in January 1984. *Stoller*, *supra*, 562 F.Supp. at 412. In September 1984, the Sixth Circuit also held that such a right existed. *Ewing*, *supra*, 742 F.2d at 915. However, certiorari was granted on *Ewing* in March 1985. Other cases had stated in

dicta that the right might exist, but these statements were often strongly qualified. *See e.g., Stevens, supra*, 646 F.2d at 1170 ("several courts have implied, in dicta, that a university student may have a cause of action for violation of substantive due process arising out of an academic dismissal from a university. . . . The *Horowitz* decision still leaves open the question as to whether such a cause of action exists. Even if a cause of action does exist, it is clear, however, the arbitrary and capricious action on the part of the university officials would be a necessary element in order for plaintiffs to prevail.") In the *Horowitz* case itself, the Supreme Court left open the question whether substantive due process protected the right not to be subject to arbitrary dismissal from a public education institution, and expressed skepticism as to the ability of the courts to evaluate academic performance. *Board of Curators of the University of Missouri v. Horowitz, supra,* 435 U.S. at 92. In sum, there is an absence of "case law which clearly and consistently recognized" in 1984-85 the substantive due process right of students not to be subjected to academic decisions made on arbitrary or nonacademic grounds. Accordingly, the individual defendants in their individual capacities are entitled to qualified immunity and the complaint should be dismissed as against them in that capacity.[3]

For the reasons stated above, the Board of Governors should be dismissed from the action. Count II should be dismissed as to the individual defendants in thier official capacities, and Count I should be dismissed to the extent that it seeks monetary damages from the individual defend-

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[3] The qualified immunity does not protect the individual defendants from official capacity suits. *Duckworth, supra,* 780 F.2d at 649.

ants in their official capacities and against the individual defendants in their individual capacities.

ELAINE E. BUCKLO
ELAINE E. BUCKLO
United States Magistrate

DATED: December 2, 1986

Written objection to any finding of fact, conclusion of law, or the recommendation for disposition of this matter must be filed with the Honorable John A. Nordberg within ten (10) days after service of this Report and Recommendation. *See* Fed.R.Civ.P. 72(b). Failure to object will constitute a waiver of objections on appeal.

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United States District Court, Northern District of Illinois, Eastern Division

Judge Nordberg

Case Number 85 C 5948

Date—May 13, 1987

Case Title—Akins v. Board of Governors

DEFENDANTS' MOTION TO DISMISS

Docket Entry:

Judgment is entered as follows:

Having reviewed the Report and Recommendation of the Magistrate, and the pleadings and briefs of the parties, the court accepts and adopts the Report and Recommendation of the Magistrate, with the clarification noted on the reverse of this order, and hereby grants defendants' motion to dismiss the complaint.

For further detail see

☒ order on the reverse of

☒ order attached to the original minute order form.

Document #27

ORDER

In Count I of the complaint, which plaintiffs brought under 42 U.S.C. § 1983, plaintiffs allege that defendants violated plaintiffs' substantive due process rights when defendants dismissed plaintiffs from a nursing course at Chicago State University. Plaintiffs allege in Count II that such actions constituted a breach of an implied contract under Illinois law.

The Magistrate recommends that the court (1) dismiss both counts against defendant Board of Governors under the Eleventh Amendment; (2) dismiss Count I under the Eleventh Amendment against the individual defendants in their official capacities to the extent that plaintiffs request monetary damages; (3) dimiss Count I against the individual defendants in their individual capacities due to their qualified immunity; and (4) dismiss Count II against the individual defendants in their official capacities under the Eleventh Amendment. The claims remaining would be Count I against the individual defendants in their official capacities to the extent that plaintiffs request injunctive relief, and Count II against the individual defendants in their individual capacities.

Plaintiffs state in their objection to the Report and Recommendation that they do not object to the recommendation that the court dismiss all claims against the Board of Governors, dismiss Count I against the individual defendants in their official capacities to the extent that plaintiffs seek monetary relief, and dismiss Count II as to the individual defendants in their official capacities. In addition, plaintiffs state in their objection that "they are suing the defendant state officials in their individual capacities and not in their official capacities." *See* Plaintiffs' Objections at 2.

In their objections to the Magistrate's Report and Recommendation, both plaintiffs and defendants assume

that the Magistrate recommends that the court deny the motion to dismiss Count I against the individual defendants in their individual capacities to the extent that plaintiffs seek injunctive relief. However, although it is not altogether clear from the Report and Recommendation, the court finds that the Magistrate properly recommends that the court dismiss all of Count I against the individual defendants in their individual capacities under the doctrine of qualified immunity. The Supreme Court recently stated that qualified immunity entitles a public official to "*immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, ___ U.S. ___, 105 S.Ct. 2806, 2816 (1985) (emphasis in original). Also, according to the Seventh Circuit, "a public official who is a defendant in a suit seeking an injunction is not 'on trial' at all. The suit seeks relief against him in his official capacity." *Scott v. Lacy*, No. 87-1101 slip op. at 2 (7th Cir. Feb. 17, 1987) (*per curiam*). Immunity from damages claims but not from claims for injunctive relief make little sense; the individual defendants would still have to stand trial, and successors would not be bound by any injunction entered against the individual defendants. Accordingly, the court clarifies that the Magistrate recommended that the court dismiss all of Count I against the individual defendants in their individual capacities, and the court adopts this recommendation.

The only remaining claim under Count I, therefore, is the claim for injunctive relief against the individual defendants in their official capacities. However, as noted above, plaintiffs state in their objection that they are not suing the individual defendants in their official capacities. Consequently, the court dismisses Count I as to all defendants in all capacities. The court also, in its discretion, dismisses Count II, the pendent state law claim, pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 725, 726, 86 S.Ct. 1130, 1139 (1966).

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-1961

ROBIN AKINS, et al.,

Plaintiffs-Appellants,

v.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 5948—John A. Nordberg, *Judge.*

ARGUED NOVEMBER 12, 1987—DECIDED MARCH 4, 1988

Before BAUER, *Chief Judge*, RIPPLE and MANION, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Robin Akins and nine other former nursing students[1] at the Chicago State University

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[1] The notice of appeal filed in this case lists the appellants in the caption as "ROBIN AKINS, et. al." However, the text continues: "Notice is hereby given that ROBIN AKINS, the plaintiff named above, hereby appeals . . . ." R.30 at 1. The defendants note that Fed. R. App. P. 3(c) requires that the "notice of appeal shall specify the party *or parties* taking the appeal . . . ." (emphasis supplied). This circuit has held that "notices of appeal

(Footnote continued on following page)

College of Nursing appeal the district court's decision to dismiss their complaint in its entirety. The appellants filed a two-count complaint in the United States District Court for the Northern District of Illinois. In count I of the complaint, the appellants alleged that the appellees, the Board of Governors and several Chicago State University officials, violated their substantive due process rights by terminating their nursing school education pursuant to an arbitrary and capricious academic policy. Count II of the complaint alleged a pendent state law claim for willful and wanton tortious conduct. The appellants sought both injunctive relief and monetary damages. The district court referred the case to a magistrate for her recommendations. Upon receipt of the magistrate's recommendations, the district court dismissed the complaint. It held that the suit was barred in part by the eleventh amendment and in part by the defense of qualified immunity. We affirm in part and reverse in part.

I

Background

In their complaint, the appellants, all senior nursing students at Chicago State University, allege that they

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[1] *continued*
are entitled to a liberal construction where the intent of the appellant is apparent and the adverse party is not prejudiced." *Scherer v. Kelley*, 584 F.2d 170, 174 (7th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979). While we think the question is a close one and the practice followed here is not to be repeated, we believe this notice was marginally adequate. Throughout the litigation in the district court, the plaintiffs had been represented by the same attorney and had presented precisely the same contentions. The facts and law applying to each were the same. Moreover, the defendants make no representation of surprise or prejudice. *See Ayres v. Sears, Roebuck & Co.*, 789 F.2d 1173, 1177 (5th Cir. 1986); *see also Brubaker v. Board of Educ.*, 502 F.2d 973, 983 n.4 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975).

were enrolled in the clinical nursing practice course number 332, "Nursing VII, Advanced Medical Surgical Nursing," during the fall semester of the 1984-85 academic year. The complaint alleges that the plaintiffs were deprived of their constitutionally protected right to due process in pursuit of their professional education in nursing by the following acts of the administrators and faculty of the University:

> a. administering a final examination on December 17, 1984, which defendants knew to be invalid in that it did not fairly evaluate students with respect to the material actually presented in the course during the semester;
>
> b. manipulating final exam questions and scores after the aforementioned final examination had been administered to Plaintiffs and others;
>
> c. basing evaluations of Plaintiffs' academic performance on factors not reasonably considered to be academic criteria;
>
> d. intentionally and knowingly falsifying Plaintiffs' clinical evaluations; and
>
> e. manipulating and altering quiz and examination grades throughout the fall trimester.

Complaint at 2-3; R.1 at 2-3. The complaint further alleges that these actions were undertaken as part of a policy to reduce the number of nursing school graduates. The alleged motivation behind this policy was the school's difficulty with the Illinois Department of Registration and Education due to the poor success rate of the school's graduates on the Illinois State licensing examinations.

In their complaint, the appellants claimed that, as a result of this policy, their reputations were injured, their ability to obtain professional employment was hindered, they were deprived of their interest in continuing their professional education, and they were caused humiliation, embarrassment and mental anguish. They sought temporary and permanent injunctive relief, including reinstate-

ment in the nursing program. They also sought compensatory and punitive damages. In a pendent claim, they sought the same relief under state law.

The appellees responded by filing with the district court a motion to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction and failure to state a claim upon which relief can be granted. The court then referred the matter to a magistrate. On December 2, 1986, the magistrate entered a report and recommendation regarding the appellees' motion to dismiss.

II

The Magistrate's Report and Recommendation

A. *Eleventh Amendment*

The magistrate first turned to the question of whether any aspect of the complaint was barred by the eleventh amendment.

1. The Board of Governors

The magistrate first determined that the Board of Governors, like the Illinois Board of Regents, is not an independent governmental subdivision but an arm of the state. Accordingly, the magistrate recommended that the Board of Governors be dismissed from the case.

2. Individual Defendants

The magistrate then turned to the individual defendants. She first noted that the complaint did not make it clear whether the individual defendants were sued in their official capacities, in their individual capacities, or both. The complaint merely listed the positions held by each defendant at Chicago State University and alleged that they acted under color of state law. While acknowledging that naming a defendant's position has been held to raise a presumption that the official is sued only in his official capacity, the magistrate also noted that the presumption is not conclusive. Because the plaintiffs had stated in their memorandum in opposition to the motion to dismiss that

they were also proceeding against the defendants as individuals, the magistrate concluded that, absent objection by the plaintiffs, she would assume that the defendants were sued both in their official and individual capacities.

a. Official Capacity

The magistrate then turned to whether the individual defendants could be sued in their official capacities without violating the eleventh amendment. With respect to monetary relief, she determined that no judgment could be imposed on this basis. She reasoned that an action against an officer in his official capacity is an action against the entity of which he is an officer and that a monetary judgment entered against an officer in that capacity imposes liability on the entity he represents. With respect to the pendent state law claim, she concluded that the eleventh amendment prohibits not only suits for monetary damages but also for injunctive relief.

b. Individual Capacity

With respect to the suit against the individual defendants in their individual capacities, the magistrate determined that the individual official, and not the state, was the real and substantial party at interest. Accordingly, the plaintiffs' action against the defendants in their individual capacities—either with respect to injunctive or monetary relief—was not barred by the eleventh amendment.

B. *The Cause of Action and Qualified Immunity*

The magistrate determined that the complaint stated a cause of action for a violation of substantive due process of law. In her view, under Illinois law, a college or university has a contractual relationship with its students that amounts to a property right in their continued education. Although the college of nursing student handbook does not expressly state that students will be graded and evaluated fairly, it does provide procedures by which students may appeal grades they think are unfair. Such provisions

constitute, concluded the magistrate, an implied promise that grading will not be arbitrary.

On the matter of immunity, the magistrate determined that the case law at that time did not clearly establish the substantive due process right to be free from arbitrary and capricious action on the part of university officials with respect to academic decisions. Accordingly, she recommended that, with respect to count I, the individual defendants in their individual capacities were entitled to qualified immunity.

C. *Summary*

The magistrate summarized her recommendations as follows:

(1) The Board of Governors should be dismissed from the action;

(2) Count I (the federal claim alleging a violation of due process) should be dismissed "to the extent that it seeks monetary damages from the individual defendants in their official capacities and against the individual defendants in their individual capacities." *Akins v. Board of Governors*, No. 85 C 5948, magistrate's report and recommendation at 14-15 (N.D. Ill. Dec. 2, 1986) [hereinafter Magistrate's report]; R.23 at 14-15.

(3) Count II (pendent state claim) should be dismissed as to the individual defendants in their official capacities.

Therefore, although the magistrate did not explicitly state which claims ought to survive, it appears that she recommended that only two claims survive. The claims are the count I allegations against the individual defendants in their official capacities to the extent that the appellants request injunctive relief, and the count II state law allegations against the individual appellees in their individual capacities.

III

The District Court's Judgment

In a terse docket entry, the district court noted that "the court accepts and adopts the report and recommendation of the magistrate with the clarification noted on the reverse of this order and hereby grants the defendants' motion to dismiss the complaint." *Akins v. Board of Governors*, No. 85 C 5948, docket entry at 1 (N.D. Ill. May 13, 1987) [hereinafter Docket entry]; R.27 at 1. The one-page "clarification," which the district court captioned an "order," amounts to a substantial revision of the magistrate's report and recommendation. For the sake of clarity, we shall set forth the district court's holding according to the organizational scheme utilized by the magistrate.

A. *Eleventh Amendment*

1. The Board of Governors

The court noted that the plaintiffs did not object to the dismissal of this party on eleventh amendment grounds.

2. Individual Defendants

a. Official Capacity

The district court further noted that the plaintiffs did not object to the dismissal of count I against the individual defendants in their official capacities to the extent that the plaintiffs sought monetary relief; nor did they object to the dismissal of count II as to the individual defendants in their official capacities. It then noted that the plaintiffs, in their objections to the report of the magistrate, had claimed that "they are suing the defendant state officials in their individual capacities and not in their official capacities." *Akins v. Board of Governors*, No. 85 C 5948, order at 1 (N.D. Ill. May 13, 1987) (quoting "Plaintiffs' Objections" at 2) [hereinafter Order]; R.27 at 2. The district court therefore held that there was no outstanding request for injunctive relief against the defendants in their official capacities.

b. Individual Capacity

The district court did not explicitly address this issue.

B. *The Cause of Action and Qualified Immunity*

Unlike the magistrate, the district court did not address explicitly whether the complaint stated a cause of action. Rather, it held that *both* claims for injunctive and declaratory relief are barred by the doctrine of qualified immunity. Because, as noted *supra*, the district court believed that the plaintiffs were suing the defendants only in their individual capacities, this analysis of the immunity issue was apparently limited to the "individual capacity" aspect of the case. In the district court's view, the holding of the Supreme Court in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), requires such a result. "Immunity from damages claims but not from claims for injunctive relief would make little sense; the individual defendants would still have to stand trial, and successors would not be bound by any injunction entered against individual defendants." Order at 1.

C. *Summary*

The district court therefore dismissed all of count I (federal due process claim) and then, in the exercise of its discretion, dismissed count II (state claims).

IV

Discussion

This case comes before us in, to put it mildly, an amorphous condition. An ambiguous complaint led to an ambiguous magistrate's report that in turn resulted in an ambiguous order by the district court.[2] Under these cir-

[2] Although neither party raises the issue, we must address whether we have jurisdiction from a final appealable order of the district court. As we recently have stated in *United States v. Ben-*

(Footnote continued on following page)

cumstances, our primary duty is to clear away the underbrush and focus the parties and the district court on the issues that remain. If the case returns here, it will, we hope, be in a somewhat more organized condition.[3]

As the case reaches us, it presents two basic issues: 1) whether the appellants can maintain an action for monetary damages against the appellees in their individual capacities; and 2) whether the appellants can maintain an action for injunctive relief against the appellees in their official or individual capacities.

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[2] *continued*
jamin, 833 F.2d 669, 671 (7th Cir. 1987) (per curiam), we have jurisdiction only if the district court dismisses the litigation: not if it dismisses the complaint. Here, the judgment reads: "Court grants defendants' motion to dismiss the complaint." R.29. Without more, this is insufficient to terminate the action and to constitute a final judgment of the district court under *Benjamin*. *See also Reytblatt v. Denton*, 812 F.2d 1042, 1044 (7th Cir. 1987) (per curiam).

Nevertheless, in *Benjamin*, we also implicitly adopted the "special circumstances" exception to this analysis. This exception permits us to exercise jurisdiction when "it is 'clear' that the court below found that 'the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make . . . .' " *California v. Harvier*, 700 F.2d 1217, 1218 (9th Cir.) (quoting *Marshall v. Sawyer*, 301 F.2d 639, 643 (9th Cir. 1962)), *cert. denied*, 464 U.S. 820 (1983); *accord Benjamin*, 833 F.2d at 672; *see also Ordower v. Feldman*, 826 F.2d 1569, 1572 (7th Cir. 1987). The district court's order clearly dismisses the entire action with no reasonable prospect for the complaint to be saved by amendment. The court held that the plaintiffs' claims were either barred by the eleventh amendment, the doctrine of qualified immunity or (as the district court interpreted the plaintiffs' objection to the report of the magistrate) by the explicit refusal of the plaintiffs to bring an action against the defendants in their official capacities.

[3] Nor do we expect to find references in the brief such as the appellees' remark that Ms. Akins "should not be allowed to fan dance her way to a viable theory." Appellees' Br. at 7. Such disrespectful comments add nothing to the substance of the argument and are inappropriate in any brief. They are especially inappropriate in the brief of a public institution in litigation with a private citizen.

A. *The Claim for Monetary Damages*

At this stage of the litigation, the parties appear to agree, as they should, that a suit for damages against a state official in his *official* capacity is a suit against the state for eleventh amendment purposes. *Papasan v. Allain*, 106 S. Ct. 2932, 2940 (1986); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Shockley v. Jones*, 823 F.2d 1068, 1070 (7th Cir. 1987). Consequently, the appellants seek to avoid the jurisdictional bar of the eleventh amendment by suing the appellees for damages in their individual capacities. A suit against state officials in their individual capacities is not a suit against the state and. therefore, is not barred by the eleventh amendment. *Papasan*, 106 S. Ct. at 2940 n.11; *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974). *See generally Ex parte Young*, 209 U.S. 123 (1908).

When an action for damages is brought against a state official in his individual capacity, he may be able to assert an immunity defense. *See Graham*, 473 U.S. at 166-67. Here, the defendants assert the defense of qualified immunity. Qualified immunity is designed to strike a balance between the competing concerns of allowing recovery in damages for the vindication of constitutional rights and "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)). When it applies, qualified immunity provides not only a defense from liability, but also "an entitlement not to stand trial or face the other burdens of litigation . . . ." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). "The entitlement is an *immunity from suit* rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial." *Id.* (emphasis in original).

In determining whether qualified immunity applies, the standard is an objective one. *Harlow*, 457 U.S. at 818.

The issue is whether the defendant official violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*; *see also Malley v. Briggs*, 475 U.S. 335, 341 (1986). In determining whether this standard of "objective legal reasonableness," *Harlow*, 457 U.S. at 819, has been reached, the legal rule at stake must be identified at a "level of generality" that permits meaningful assessment of the reasonableness of the official's conduct. *Anderson v. Creighton*, 107 S. Ct. 3034, 3039 (1987). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preexisting law the unlawfulness must be apparent." *Id.* (citation omitted).

We believe that the magistrate correctly concluded that, at the time the defendants allegedly acted, they violated no "clearly established constitutional right." The question of whether a student at a state-supported university has a substantive due process right to continued enrollment in the program has been presented to the Supreme Court twice in recent times. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 222 (1985); *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91 (1978). On both occasions, the Court has declined specifically to decide the matter; in both cases, the Court assumed, for the sake of argument, that such a right existed and decided the case on another ground. No case from this court establishes such a right. As the magistrate pointed out, there have been several cases of fairly recent vintage in other lower federal courts that have indicated the existence of such a right. *See, e.g., Ewing v. Regents of the Univ. of Mich.*, 742 F.2d 913, 915 (6th Cir. 1984), *rev'd and remanded on other grounds*, 474 U.S. 214 (1985); *Stoller v. College of Medicine*, 562 F. Supp. 403, 412 (M.D. Pa. 1983), *aff'd per curiam*, 727 F.2d. 1101 (3d Cir. 1984). Other cases have, in dictum, suggested, albeit with signifi-

cant qualifications, the existence of such a right. *See, e.g., Hines v. Rinker*, 667 F.2d 699, 703 (8th Cir. 1981); *Stevens v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981) (and citations therein); *Mahavongsanan v. Hall*, 529 F.2d 448, 449-50 (5th Cir. 1976); *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975). We believe that a university administrator, surveying these cases at the time the alleged activity described in the complaint took place, would have concluded that a substantive due process-based right to continued enrollment in a state-sponsored academic program was not clearly established. Therefore, the defendants in this case are protected from an action for damages by the doctrine of qualified immunity.[4]

B. *The Claim for Injunctive Relief*

The district court held that the plaintiffs were precluded from seeking injunctive relief because, in their objections to the magistrate's report, they stated at one point: "As the plaintiffs stated in their responsive memorandum in opposition to the Motion to Dismiss, at pages 4-5, they are suing the defendant state officials in their individual capacities and not in their official capacities." Order at 1. Apparently referring only to the possibility of injunctive relief against the defendants in their individual capacities, the district court also held that the Supreme Court's holding in *Mitchell*, precluded an action for injunctive relief:

> The Supreme Court recently stated that qualified immunity entitles a public official to "*immunity from suit* rather than a mere defense to liability." *Mitchell*

[4] On appeal, the appellants also argue that their complaint raises a procedural due process claim. The magistrate was of the view that such a claim was not reasonably raised in the complaint. Magistrate's report at 9 n.2. The appellants did not renew explicitly this argument before the district court. In our view, the matter is not properly before us. In any event, we believe that the magistrate's determination was correct.

> *v. Forsyth*, ____ U.S. ____, 105 S.Ct. 2806, 2816 (1985) (emphasis in original). Also, according to the Seventh Circuit, "a public official who is a defendant in a suit seeking an injunction is not 'on trial' at all. The suit seeks relief against him in his official capacity." *Scott v. Lacy*, No. 87-1101 slip op. at 2 (7th Cir. Feb. 17, 1987) (*per curiam*). Immunity from damages claims but not from claims for injunctive relief would make little sense; the individual defendants would still have to stand trial, and successors would not be bound by any injunction entered against the individual defendants.

Id.

1.

We have reviewed the record carefully and must respectfully differ with the district court as to whether the plaintiffs abandoned their claim for injunctive relief against the defendants in their official capacities. When the plaintiffs' "objections to the magistrate's report" is read in its entirety, it is quite clear that they continued to press such a claim for injunctive relief. The plaintiffs' reference to pages 4-5 of their memorandum in opposition to dismiss makes this reading particularly appropriate. In that document they state:

> 1) Consequently, prospective injunctive and declaratory relief against these state officials is available to those plaintiffs, regardless of whether the defendants are sued in their official or individual capacities. Monetary damages are also available to plaintiff[s] because these state offices [sic] are being sued in their capacities as individuals, so that retroactive or monetary relief will be had against these defendants as individuals and not as state officials. Hence, 11th Amendment sovereign immunity does not operate to bar monetary damages.

Plaintiffs' Response to Motion to Dismiss at 3-4; R.11 at 3-4.

> 2) The state officers named as defendants in the case at bar are therefore neither immune from prospective injunctive relief nor, because sued in their individual capacity, from retroactive monetary relief.

Id. at 5.

Moreover, in their objections to the magistrate's report, the plaintiffs specifically acknowledged the continued vitality of their claim for injunctive relief:

> Magistrate Bucklo has recommended Count I stand to the extent it requests prospective injunctive relief against the officials, regardless of whether they are being sued as state officials or as individuals.

Plaintiffs' Objections to Report And Recommendation of Magistrate Bucklo at 2; R.25 at 4.

An action for prospective injunctive relief against a state official is brought properly in the official's *official* capacity. As the court noted in *Scott v. Lacy*, 811 F.2d 1153 (7th Cir. 1987):

> As a practical matter, a public official who is a defendant in a suit seeking an injunction is not "on trial" at all. The suit seeks relief against him in his official capacity; he need not attend the trial, which will be conducted by attorneys representing the governmental body. If he leaves office during the interim, he leaves the case behind and his successor becomes the party.

Id. at 1153-54. Therefore, we need not deal extensively with the district court's conclusion that the doctrine of qualified immunity can shield a defendant from suit seeking injunctive relief in his individual capacity. We only note that the Supreme Court has only applied the immunity doctrine in suits for damages. *See Harlow*, 457 U.S. at 806 ("[O]ur decisions consistently have held that government officials are entitled to some form of immunity from suits for damages."). At least three circuit courts of appeals have explicitly noted that qualified immunity is inapplicable to actions seeking equitable relief. *See, e.g., De*

Abadia v. Izquierdo Mora, 792 F.2d 1187, 1188 n.1 (1st Cir. 1986) ("Qualified immunity is, of course, no defense to equitable relief."); *Tubbesing v. Arnold*, 742 F.2d 401, 403-04 (8th Cir. 1984) ("[T]he Board members' qualified immunity defense would entitle them to summary judgment only on the damages' claims. The Board would still be required to defend itself in any trial involving Tubbesing's claim for equitable relief."); *Bever v. Gilbertson*, 724 F.2d 1083, 1086 (4th Cir.) ("[T]he appellants have no immunity from being put to trial on the equitable claims."), *cert. denied*, 469 U.S. 948 (1984).

C. *Validity of Cause of Action*

In their motion to dismiss, the defendants claimed that the plaintiffs had not stated a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). In her report and recommendation to the district court, the magistrate concluded that the plaintiffs have stated a cause of action. Magistrate's report at 9-12. As noted earlier, the district court recited that it "accepts and adopts the Report and Recommendation of the Magistrate, with the clarification noted on the reverse of this order . . . ." Docket entry at 1. The "clarification" is, as the foregoing discussion demonstrates, a significant shift in the grounds for decision. Indeed, given the district court's disposition of the case, it was not necessary for the court to address squarely the validity of the cause of action. Moreover, we are not willing to presume that the district court would pass *sub silentio* on an issue upon which the Supreme Court has twice deferred decision and that other lower courts have, as a matter of prudence, refrained from resolving when not absolutely necessary to the decision of the case. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (courts should only reach constitutional issue when necessary to the decision).

Accordingly, we think the question of the sufficiency of the complaint should be addressed in the first instance by the district court. On remand, the district court may

determine that it is appropriate to address immediately the sufficiency of the complaint or, given the state of the record, and the above-cited admonition of Justice Brandeis, it may decide to postpone decision on this matter until the contours of the claim of the plaintiffs have been delineated more precisely.

Conclusion

The district court correctly determined that count I should be dismissed insofar as it seeks damages from the defendants in either their official or individual capacities. The first theory is barred by the eleventh amendment; the second by the doctrine of qualified immunity. The district court erred, however, in dismissing count I of the complaint insofar as it seeks injunctive relief against the defendants in their official capacities.[5]

Accordingly, the judgment of the district court is affirmed in part and reversed in part. Each party will bear its own costs of this appeal.

AFFIRMED IN PART
REVERSED IN PART

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[5] The district court summarily dismissed count II, the pendent state law claim, apparently because it had dismissed the federal claim in its entirety. *United Mine Workers v. Gibbs*, 383 U.S. 725, 726 (1966). That claim, insofar as it seeks damages against the defendants in their individual capacities based on state law, must be reinstated.

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JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 4, 1988.

Before
Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

ROBIN AKINS,
Plaintiff-Appellant,
No. 87-1961
vs.
BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, et, al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 85 C 5948
Judge John A. Nordberg

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, and REVERSED IN PART, with each party to bear its own costs on appeal, in accordance with the opinion of this Court filed this date.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 15, 1988

Before
Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

ROBIN AKINS,
Plaintiff-Appellant,
No. 87-1961
vs.
BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, et, al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 85 C 5948
John A. Nordberg, *Judge*

ORDER

The slip opinion issued by this court on March 4, 1988 is corrected as follows:

Page 13, delete the heading numbered 1.

Page 14, three lines from the bottom of the page, delete the word circuit before courts.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 11, 1988

Before
Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

ROBIN AKINS,
Plaintiff-Appellant,

No. 87-1961

vs.

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, et, al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 85 C 5948
John A. Nordberg, *Judge*

ORDER

On consideration of the petition for rehearing filed on March 17, 1988 in the above-entitled cause by the attorneys for defendants-appellees, all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, DENIED.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBIN AKINS, et. al.,
Plaintiffs,

vs.

BOARD OF GOVERNORS OF STATE COLLEGES & UNIVERSITIES, et, al.,
Defendants.

No. 85 C 05948
JUDGE NORDBERG

NOTICE OF APPEAL

NOTICE is hereby given that ROBIN AKINS, the plaintiff named above, hereby appeals to the United States Court of Appeals for the Seventh Circuit from this Court's:

Order accepting and adopting the Report and Recommendation of the Magistrate entered on May 13, 1987.

Clarification of the Report and Recommendation of the Magistrate entered on May 13, 1987.

Order granting defendants motion to dismiss the complaint entered on May 13, 1987.

June 12, 1987.

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Supreme Court, U.S.
FILED
SEP 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, DR. GEORGE AYERS, DR. WILLIAM SUTTON, DR. BERLEAN BURRIS, BEATRICE GILMORE and SANDRA WEBB-BOOKER,

Petitioners,

v.

ROBIN AKINS, ALBERTA BELL, ESTELLE BRADLEY, TANYA DAVIS, CAROLYN GRANT, NAOMI HAYS, TONI SADLER, MARGARET SAYERS, RHONDA SINGLETON and BETTY WHITE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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No. 88-41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, DR. GEORGE AYERS, DR. WILLIAM SUTTON, DR. BERLEAN BURRIS, BEATRICE GILMORE and SANDRA WEBB-BOOKER,

Petitioners,

v.

ROBIN AKINS, ALBERTA BELL, ESTELLE BRADLEY, TANYA DAVIS, CAROLYN GRANT, NAOMI HAYS, TONI SADLER, MARGARET SAYERS, RHONDA SINGLETON and BETTY WHITE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully represent that there are no issues in this cause which would justify this Court's grant of a Writ of Certiorari herein.

STATEMENT OF THE CASE

Respondents, all of whom were senior nursing students at Chicago State University, a public institution, brought this suit claiming that the Defendants, Petitioners here, had deprived them of their property interests in continuing their professional education and pursuing their nursing careers without due process. They further alleged that these actions stigmatized them and substantially impaired their present and future employment opportunities.

The factual allegations of the Complaint stated that the final examination administered to them was invalid in that it did not pertain to the material actually covered in the course during the semester. They also complained that the final examination questions and scores were manipulated after the final examination had been given, that the evaluation of their academic performance was based upon factors not reasonably considered to be academic criteria, and that the individual defendants had intentionally falsified their clinical evaluations, as well as manipulating and altering quiz and examination grades throughout the fall trimester. They sought monetary and injunctive relief pursuant to 42 U.S.C. Section 1983.

In a second count, they claimed monetary relief under a state law cause of action. Petitioners timely filed their Motion to Dismiss, which was referred to a Magistrate for preliminary ruling.

The Magistrate recommended that the Board of Governors of State Colleges and Universities should be dismissed from the action. She further recommended that Count I should be dismissed to the extent that it sought monetary damages from the individual defendants, but

should continue as to those defendants in their official capacity insofar as it sought prospective injunctive relief. She further recommended that Count II of the Complaint, based upon pendent state grounds, be dismissed as to the individual defendants in their official capacities, but continue insofar as it sought monetary damages against defendants in their individual capacities.

Upon objections to this recommendation, the District Court purported to adopt the report and recommendation of the Magistrate, with a "clarification". That clarification held that Respondents had abandoned any claim against Petitioners in their official capacity. Based upon this finding, the District Court dismissed the claim for injunctive relief under Count I of the Complaint, and dismissed Count II, the pendent state claim, without consideration of its merits.

Respondents timely filed their Notice of Appeal, failing however, to set forth the names of all Plaintiffs in that notice merely referring in the caption to "Robin Akins, et al."

On appeal, the Court of Appeals for the Seventh Circuit, pursuant to its long-standing practice, that notices of appeal are entitled to a liberal construction where the intent of the appellants is apparent and the adverse party is not prejudiced, held that the Notice of Appeal was sufficient to apprise Petitioners that all Plaintiffs were appealing from the dismissal of the case. The Court specifically noted that "the defendants make no representation of surprise or prejudice."

In considering the merits of the appeal, the Court of Appeals held that the District Court had been mistaken in holding that Respondents had waived their claim against the defendants in their official capacity for prospective in-

junctive relief. It therefore reversed the dismissal of the case, and remanded to the District Court for further consideration. In so doing, the Court of Appeals specifically noted that the District Court had not passed upon whether the Complaint stated a cause of action, and directed that the District Court do so, specifically stating that "the question of the sufficiency of the complaint should be addressed in the first instance by the district court." In a footnote, the Court noted that the District Court has summarily dismissed the pendent claim, "apparently because it had dismissed the federal claim in its entirety." It therefore ordered that count be reinstated as well.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT PRESENT A SUBSTANTIAL ISSUE AS TO THE RETROACTIVITY OF THIS COURT'S NEWLY ANNOUNCED RULE IN *TORRES v. OAKLAND SCAVENGER COMPANY.*

The decision of the Court of Appeals for the Seventh Circuit in this case was handed down on March 4, 1988. As noted above, in that decision the Court held that the Notice of Appeal, although not naming each of the Plaintiffs individually, was sufficient to place Petitioners on notice that all plaintiffs were appealing the dismissal of their Complaint, even though they were merely described as "Robin Akins, et al." Subsequently, on June 24, 1988, this Court issued its decision in *Torres v. Oakland Scavenger Company*, ____ U.S. ____, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), holding that a party whose name is omitted from a Notice of Appeal has not complied with the provisions of Rule 3(c), Federal Rules of Appellate Procedure.

As was noted by this Court in *Torres*, and acknowledged by Petitioners in their Petition for Certiorari, prior to this Court's decision in *Torres*, there was a conflict in the circuits "over whether a failure to file a notice of appeal in accordance with the specificity requirement of Federal Rule of Appellate Procedure 3(c) presents a jurisdictional bar to the appeal." *Torres v. Oakland Scavenger Company, supra.*

Since the decision of the Court of Appeals in this case was issued nearly four months prior to this Court's decision in *Torres*, the issue presented by this case must necessarily be whether the ruling in *Torres* is retroactive.

In holding that the Notice of Appeal filed by these Respondents was sufficient, the Court of Appeals followed its long-standing position on the issue, as previously enunciated in *Scherer v. Kelley*, 584 F.2d 170 (7th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979). As noted by the Court of Appeals, "throughout the litigation in the district court, the plaintiffs had been represented by the same attorney and had presented precisely the same contentions." And, as indicated earlier, Petitioners had made no claim of prejudice.

Thus, the issue which would be presented to this Court is whether the Court of Appeals' reliance upon its previous practice of liberally construing Notices of Appeal should be set aside because this Court has subsequently concluded that such an approach is inappropriate. We must first note that a ruling on this issue will have an extremely limited application. It will apply only to those cases which are now pending on appeal, in those circuits which had taken the same approach as the Seventh Circuit. Since this Court has now spoken definitively on the issue in *Torres*, all potential appellants are put on notice of the specificity requirements of Rule 3(c), Federal Rules

of Appellate Procedure. Little purpose would be served by requiring dismissal of appeals of appellants such as Respondents who had inartfully prepared their Notice of Appeal prior to that decision.

Respondents and the Court of Appeals relied upon the prior policy of the Seventh Circuit. As this Court has stated, new procedural rules should not be applied retroactively where a view, even though mistaken, is supported by respectable authorities, including the Court below. *England v. Louisiana Medical Examiners*, 375 U.S. 411, 422, 84 S.Ct. 461, 11 L.Ed.2d 440, 449 (1964). There is no hard and fast rule of retroactivity, even in constitutional cases. *Linkletter v. Walker*, 381 U.S. 618, 629, 85 S.Ct. 1731, 14 L.Ed.2d 601, 608 (1965). As this Court has recently reaffirmed, federal cases should be decided in accordance with the law existing at the time of decision. *St. Francis College v. Al-Khazraji*, ____ U.S. ____, 107 S.Ct. 2022, 95 L.Ed.2d 582, 589 (1987). The decision of the Court of Appeals in this case was in accordance with its existing precedent at the time. Nothing appears in the record in this case, which is still at the pleading stage, which would indicate a departure from that rule.

The form of the Notice of Appeal in this case, and the effect given it by the Court of Appeals for the Seventh Circuit does not present the type of issue which would merit this Court's grant of a Writ of Certiorari.

II.

THE ISSUE OF PENDENT JURISDICTION IS NOT RIPE FOR ADJUDICATION IN THIS CASE.

Petitioners have asserted in their Petition for Writ of Certiorari that the Court of Appeals has stripped the District Court of its discretion to decide whether pendent jurisdiction should be exercised over them personally for

state law claims. A reading of the decision of the Court of Appeals makes it clear that the Court of Appeals has done nothing of the kind.

As noted by the Court of Appeals, it reversed the dismissal of this case because the District Court seemingly did not understand the issues before it. The magistrate to whom the motion to dismiss was first referred recommended that the motion be denied against the defendants in their official capacities insofar as the complaint sought prospective injunctive relief. The magistrate further determined that the individual defendants (petitioners here) were entitled to qualified immunity from monetary damages because the right sought to be asserted was not clearly determined as of the time of the acts alleged. The magistrate further recommended that the motion to dismiss Count II of the Complaint, which raised purely state law claims for damages, be denied as well.

The District Court, while purporting to adopt the recommendations of the magistrate, in reality rejected those recommendations. It dismissed the case in its entirety, based upon the finding that Plaintiffs had abandoned their claim for injunctive relief.

In reversing, the Court of Appeals essentially reinstated the recommendations of the magistrate. It agreed that the defendants were entitled to qualified immunity in their individual capacities. It reversed the holding of the District Court that Plaintiffs had abandoned their claim for injunctive relief against the defendants in their official capacities, and reversed for further proceedings. Since the District Court had not decided whether the Complaint stated a claim upon which relief could be granted, the Court of Appeals directed the District Court, on remand, to consider whether the Plaintiffs had in fact stated a cause of action. In passing, the Court of Appeals noted

that since Count II of the Complaint, which set forth a pendent state claim, had been dismissed by the District Court without any consideration of its merits, that count should be reinstated as well. *Akins v. Board of Governors of State Colleges and Universities*, 840 F.2d 1371 (7th Cir. 1988).

Petitioners argue to this Court that by directing the reinstatement of the pendent claim, as well as the reinstatement of the claim brought pursuant to 42 U.S.C. Section 1983, the District Court has been deprived of its discretion to decide whether the pendent claim ought to proceed or not. It is obvious that the Court of Appeals intended only to reinstate the pleading, so that the District Court could fully consider whether it properly stated a claim for relief. Thus, upon remand, the issues as to whether the complaint states a claim, and whether the individual defendants may be sued in their individual capacity under the pendent state claim are still open for consideration by the District Court. The issues sought to be raised by Petitioners here have yet to be decided by the District Court.

In short, this issue is not ripe for consideration by this Court. Neither the District Court nor the Court of Appeals has determined whether Plaintiffs have stated a claim. If, on remand, it is decided that no claim has been stated under 42 U.S.C. Section 1983, the issue of pendent jurisdiction over the state claims will evaporate. Only if it is decided that a claim is stated will the pendent claim issue need to be addressed.

If the District Court determines that the federal claim is valid, it will then be required to decide whether the pendent state claim should be entertained by it. At that juncture, it will be free to exercise its discretion in deciding that issue. At this stage, however, that question

still remains open. It has not been decided by either court below. The record in this case does not present the pendent jurisdiction issue in a manner which makes it appropriate for consideration by this Court.

CONCLUSION

This case presents no issues which are either worthy for review or ripe for review by this Court. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 88-41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, DR. GEORGE AYERS, DR. WILLIAM SUTTON, DR. BERLEAN BURRIS, BEATRICE GILMORE AND SANDRA WEBB-BOOKER,

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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October 10, 1988

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No. 88-41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, DR. GEORGE AYERS, DR. WILLIAM SUTTON, DR. BERLEAN BURRIS, BEATRICE GILMORE AND SANDRA WEBB-BOOKER,

Petitioners,

v.

ROBIN AKINS, ALBERTA BELL, ESTELLE BRADLEY, TANYA DAVIS, CAROLYN GRANT, NAOMI HAYS, TONI SADLER, MARGARET SAYERS, RHONDA SINGLETON AND BETTY WHITE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

ARGUMENT

I. THE DECISION IN *TORRES* V. *OAKLAND SCAVENGER COMPANY*, U.S. , 108 S.Ct. 2405 (1988) DOES NOT CONTAIN A "NEWLY ANNOUNCED RULE" AND DOES NOT REQUIRE A DISCUSSION OF RETROACTIVITY ESPECIALLY WHEN ITS HOLDING IS APPLIED TO PENDING CASES SUCH AS THIS CASE.

Respondents do not contest Petitioners' argument that the decision of the Seventh Circuit is in direct conflict with this Court's decision in *Torres* v. *Oakland Scavenger Company,* U.S. , 108 S.Ct. 2405 (1988) and that *Torres* was decided before the Seventh Circuit's decision became final. Instead, Respondents argue, incorrectly, that the appellate court followed a long standing position favoring liberal construction of notices filed under Federal Rule of Appellate Procedure 3(c). According to Respondents, a reversal of the decision below or a remandment of this case for reconsideration in view of this Court's decision in *Torres* would require retroactive application of that decision. Petitioners argue that retroactivity is not an issue in this action.

In a civil case, a change in the applicable law while a case is pending on direct review will normally be given effect. *Linkletter* v. *Walker,* 381 U.S. 618, 626-627, 85 S.Ct. 1731, 1735-1736 (1965), citing *United States* v. *Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801). Even newly declared constitutional rules of criminal procedure are applied retrospectively at least as to convictions not yet final when the rule is established. *United States* v. *Johnson,* 457 U.S. 537, 102 S.Ct. 2579 (1982). The decision of the appellate court in this case was not final. If the petition for certiorari in this case had been filed after the appellate court issued its opinion but before the decision in *Torres* was announced, then this Court would have either reversed or remanded this case for further consideration in view of *Torres.* There is no reason to apply a different rule to this case. Petitions challenged the notice of appeal in their appellate brief, in their petition for rehearing, and in their petition for certiorari. At every opportunity petitioners have argued, correctly, that the notice of appeal does not satisfy the requirements of Federal Rule of Appellate Procedure 3(c).

Torres did not establish a new principle of law either by deciding an issue of first impression or overruling clear past precedent. This is the first question to be considered in dealing with non-retroactivity questions. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107, 92 S.Ct. 349, 355-356 (1971). The opinion of this Court clearly states that certiorari was granted to resolve a conflict in the Circuits over the proper interpretation of Federal Rule of Appellate Procedure 3(c). *Torres* specificially provides that it is consistent with prior interpretations of the Federal Rules of Appellate Procedure by this Court. Under these circumstances the Respondents cannot satisfy the first step of the *Chevron* non-retroactivity test. See, *Dasho* v. *Susquehanna Corp.*, 461 F.2d 11, 20-21 (7th Cir.), cert. denied, 408 U.S. 925, 92 S.Ct. 2496 (1972).

The third question posed by *Chevron* would require a court to weigh the possible inequities of retroactive application of a court decision. Since there were conflicting rules in the Circuits, Respondents knew that the issue was not settled and that the notice of appeal they filed might be inadequate. It is therefore, no more inequitable here than in any case presenting an unsettled question to require Respondents to bear the consequences of their decision to file an inadequate notice. See, *Dasho, supra* at 21; *United States* v. *Serfass*, 492 F.2d 338, 395 (3rd Cir. 1974), aff'd, 420 U.S. 377, 95 S.Ct. 1055 (1975).

Although the Respondents argue that the Seventh Circuit followed a long standing position favoring liberal construction of notices filed under Federal Rule of Appellate Procedure 3(c) this overstates the case. In fact, the decision in *Torres* did not overrule any decision of the Seventh Circuit upon which Respondents could have relied when their notice of appeal was filed. This case is not like *Saint Francis College* v. *Al-Khazraji*, U.S. , 107 S.Ct.

2022, 2025-2026 (1987) where the plaintiff relied on a rule clearly established in the Third Circuit. Here, the Seventh Circuit said that even under a liberal view the question presented was "a close one" and the notice of appeal was only "marginally adequate". *Akins* v. *Board of Governors of State Colleges and Universities*, 840 F.2d 1371, 1371-72 n. 1 (7th Cir. 1988). There was actually no strong Seventh Circuit precedent upon which Respondents could have relied in filing an inadequate notice. Even if a full review of this case is not granted, at a minimum, the case must be remanded for reconsideration in view of *Torres*.

II. DOES THE SUMMARY REINSTATEMENT ON APPEAL OF A PENDENT CAUSE OF ACTION VIOLATE THE PRINCIPLES ESTABLISHED BY THIS COURT IN *MINE WORKERS* V. *GIBBS*, 383 U.S. 715 (1966), AND UNFAIRLY JEOPARDIZE THE DEFENSE OF QUALIFIED GOOD FAITH IMMUNITY?

Again, Respondents do not contest Petitioners' argument that a court of appeals may not properly require a pendent state count to be tried together with a single federal count against individuals acting only in their official capacities. Instead, Respondents argue that the court below intended only to reinstate the pendent count for the purpose of its being reviewed by the district court. This is a surprising position for Respondents to take, and represents a form of victory for Petitioners because it amounts to Respondents' agreement to reopen the issue below.

Petitioners contend that the decision whether to exercise pendent jurisdiction is reposed in the first instance in the district courts. See, *Carnegie-Mellon University* v. *Cohill*, ____ U.S. ____, 108 S.Ct. 614, 619 (1988). The Seventh Circuit's decision that the pendent count here "must" be reinstated is in err.

CONCLUSION

Based upon the Petitioners' petition for writ of certiorari and the foregoing arguments and authorities in this Reply, the judgment of the Court of Appeals should be reversed or, at a minimum, this case must be remanded for reconsideration in view of this Court's decision in *Torres*.

Respectfully submitted,

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October 10, 1988

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OCTOBER TERM, 1988

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Respondents.

CERTIFICATE OF SERVICE

Mark T. Dunn, counsel of record, hereby certifies, pursuant to Supreme Court Rule 28.3 and 28.5(c), that three copies of the Reply Brief Of Petitioners on the Petition For A Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit were served by first class mail, postage prepaid, by mailing on October 10, 1988, upon all parties required to be served. A list of the names and addresses of those parties is:

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